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NEW SAFEGUARDS FOR PUBLIC SERVICES IN EUROPE ENSURING LEGAL CERTAINTY, LOCAL AUTONOMY AND CITIZENS' RIGHTS

Foreword

High quality public services, accessible to all, are at the heart of the European vision of a well-run society. If the EU can get public services right, it will offer a powerful example of what a Citizen's Europe can mean in practice.

In recent years, many Europeans have become uncertain about the nature and destination of the European project. They want reassurance that the European vision is about more than just a common internal market. And they worry that the European Union may be a threat to national, regional or local autonomy in providing public services.

The EU currently has no clear framework law on public services generally, but it has highly detailed legislation and Treaty provisions on the internal market. So, whenever challenges have arisen about applying European rules on competition and public procurement to public services, it is usually the principles of the internal market which have guided the decisions of the Commission and the European Court of Justice.

In a Citizen's Europe, such services should answer to the logic of the public good, and not be left to the dictates of the free market. Public authorities, whether at national, regional or local level, must be free to organise public services in their own way to meet citizens' needs. But that can only be achieved, and legal certainty created for public authorities, public and private service providers and citizens, if at European level, a clear legal framework defines the relationship between the provision of a public service and the rules of the internal market.

That is why the Labour Party has consistently worked with the PES Group to produce a proposal for a European framework law on what are known in legal language as 'services of general economic interest' (SGEI). The political context for these services has evolved considerably since the first acknowledgement of public services in the Amsterdam Treaty. In the European Convention on the Future of Europe the Labour Party and its PES allies pressed successfully for a stronger legal base to safeguard the unique characteristics of public service provision in the Member States. We have since ensured these positive elements of the proposed constitution have been carried forward into the Lisbon Reform Treaty.

The Lisbon Treaty now gives the European Parliament and Council of Ministers an unquestionable legal basis for legislating, under the co-decision procedure, on public services under the revised article 16 which would become Article 14 of the Treaty on the Functioning of the European Union (TFEU). In addition, a new legally binding Protocol on public services provides valuable interpretative guidelines for any future Community regulations. On top of that the Charter of Fundamental Rights, which would also become legally binding with the ratification of Lisbon, unequivocally protects the rights of citizens to access to public services.

The Lisbon Treaty therefore gives us the instruments to reassure our citizens that the future of public services is safe, provided national governments support them at home and also support the European legislation that would be possible with Lisbon. It is from this fresh perspective that we have decided to take matters in hand and publish a proposal for a regulation on services of general economic interest (SGEI). This proposal demonstrates the practical value of ratifying the new Treaty. We do not claim to resolve all the issues. Rather this proposal seeks to pave the way towards a genuine, consistent and innovative legislative 'package' which will demonstrate beyond doubt that citizens can continue to have confidence that we are building a Europe which serves their need for a better quality of life.

We also want to encourage a debate with public service providers, national and local public authorities, citizens' groups and all who share our vision of a Europe that is more than a market and in which good public services are part of what makes a good society.



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Introduction

Labour joins with European Socialists' call for European Legal Framework for Public Services.

Access to high-quality public services is a key political issue. Good schools and hospitals, clean water, safe and reliable transport and energy, for example, figure in most definitions of a good quality of life. Now the Labour Party in Ireland with the support of the Party of European Socialists in the European Parliament is calling for action to safeguard and enhance public services throughout the European Union. The potential for achieving these safeguards have been greatly increased by the provisions of the Lisbon Reform Treaty.

The importance of public services

Public services are not only an essential element in the quality of life of individual citizens. They have a key role to play in the EU's flagship Lisbon strategy, which aims to build on the strengths of Europe's social and economic model to create the world's most dynamic, cohesive and sustainable economy with full employment. Good public services can help to overcome economic stagnation, social exclusion and isolation; strengthen social and territorial cohesion; and improve the functioning of Europe's internal market and its external competitiveness.

High-quality public services — open and transparent, with equal access for all, as underlined in Article 36 of the Charter of Fundamental Rights of the European Union, recognised by the Treaty of Lisbon as having equal legal value to the treaties — are therefore essential elements in the European model of society. Market forces alone cannot ensure the public services we need. That is why public authorities at every level are deeply involved in providing, regulating, organising or — to various degrees — financing or supporting such services. It is not the EU's job to interfere in the provision of such services — instead we must insist that the EU should create a legal framework which allows public authorities at every level to carry out their mission of safeguarding the public interest in provision of these services. And the EU has also a role to play in guaranteeing adequate standards across the European Union, making good public services a tangible expression of European citizenship.

It is from this dual perspective that the Lisbon Treaty can be regarded as a major step forward as it amends the current Article 16 of the EC Treaty to create a clear legal basis which covers the adoption of rules laying down the principles and conditions — especially the economic and financial conditions — governing the effective accomplishment of the missions undertaken by services of general economic interest (SGEI). The Lisbon Treaty

stipulates that the exercise of this new Community competence shall be without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services, using a wide-ranging power defined as 'discretionary' by the new Treaty Protocol on services of general interest (SGI).

Different National Traditions

Throughout Europe, good public services are seen as an essential element in a civilised society. But national traditions — what is provided, how and by whom — vary greatly; creating misunderstandings and confusion about what exactly is meant by public services and reluctance even to attempt to develop common European criteria and guidelines.

National, regional and local authorities are rightly defend their autonomy to define their policies for their citizens in their own way. But in practice they are often confronted with interference by the European Commission or by the European Court of Justice, which have judged their activities from the perspective of the EU's internal market rules — for example, deeming cross-subsidisation to be contrary to state aid rules; imposing onerous public procurement obligations; or treating some public service obligations as barriers to the European single market.

This experience has shown that we have neither sufficient safeguards for local autonomy, nor the legal certainty which public service providers, public authorities, private businesses and service users need. These are the central problems for which we need the regulations that can be adopted under Article 14 of the Lisbon Treaty The new Protocol on SGI again stresses, the diversity of SGEI and the possible differences in user needs and preferences owing to different geographic, social or cultural situations. In other words, it is with respect for the principle of subsidiarity that the present initiative aims to reassert the power of the competent authorities, both national and local, to organise their public services as they see fit, whilst protecting them from other Community initiatives, in particular sectoral initiatives, which could call into question this power.

What are public services? Grappling with law and jargon

Different people mean different things by 'public services'. Some people think of public services as being those provided, or financed, by the public sector. For others, the key criterion is whether they are provided 'in the public interest' ... and in this complicated debate, many other definitions have been offered.

In the PES Group's proposal for a legal framework, we talk about '**services of general interest**' (SGI for short), because we are concerned about services where there is a wider public interest in their availability, quality and accessibility, regardless of whether they are publicly owned. And in line with the current Articles 16 and 86(2) of the EC Treaty (respec-

tively the future Articles 14 and 106(2) of the TFEU), we talk also about '**services of general economic interest**' (SGEI) — which are those most likely to be affected by Europe's existing internal market rules.

The idea behind Article 16 EC is to single out those services which could significantly affect the operation of the single market, because they are economic in character, from non-economic services which do not. Non-economic services, including for example policing and the administration of justice, are seen as matters wholly for national and sub-national government, on which the EU has no competence. Article 2 of the new Protocol on SGI thus forcefully points out: '*The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.*' Unfortunately, current EU law gives no clear guidance on how to distinguish between services of general economic interest, non-economic services of general interest and other services - which means that it is not clear, in individual cases, whether and to what extent EU rules on the single market apply.

The aim of the regulations on SGEI that we are proposing is therefore to clarify the situation, in order to **safeguard local autonomy, and the principle of subsidiarity**, by defining the relationship between — on one hand — single market rules and — on the other — the pursuit of public interest objectives in the provision of those services of general interest which do have a significant economic dimension and could affect the operation of the single market. Following Treaty usage, we shall call the latter Services of General Economic Interest.

Confusion and uncertainty in current legislation

We must also put an end, where possible, to the great uncertainty generated by the decision-making process of the Commission and the case-law of the Court of Justice due to the fact, *inter alia*, that the Treaty sets out only the most general principles governing public services¹, whereas there is a detailed body of EU legislation interpreting and implementing its single market provisions.

It is not clear to what extent services of general interest or general economic interest are covered — for instance — by competition law, single market legislation, or rules designed to regulate subsidies or open up public procurement. The law evolves through the — often unpredictable — twists and turns of Commission or European Court judgements. And the opening up of various public services networks over the years to competition— such as telecoms, posts, energy and rail in some Member States — has been based each time on different rules, adding to the legal complexity and uncertainty.

For example several European Court judgments have called into question the methods of organisation and financing chosen by town councils. This was notably the case for a bus

service in a German canton (Altmark judgment), and for energy services or even municipal heating services in certain Italian districts (Conam and Teckal judgments). The Commission, for its part, has initiated proceedings against several Member States to contest the operation by their administration, or their authorities, of local services as various as museums (in Germany), ambulance services (Tuscany), or water treatment (Hamburg), or even to call into question local management systems (such as the inter-communal public cooperation establishments in France).

Thus, in the vacuum left by the European legislator, the Court of Justice through its jurisprudence sets the rules of financing, of operation and delegation, of concession, of public-private partnership, of organisation of semi-public companies, for local public services, to the detriment of the choices made by elected local authorities in accordance with the mandate they have received from the citizens.

Without a clear legal framework, the financing and management of public services in Europe depend on the unpredictable development of case law and judicial interpretation. The adoption of the so-called Altmark package in November 2005 on the fate of public service compensation in view of Community rules on state aid did little to resolve all the problems relating to the ongoing funding of SGEI. Furthermore, the Commission's recent Green and White Papers on Services of General Interest and the Communication on Social Services of General Interest², have disappointed those who hoped for a new, surer legal framework for public services: the Commission documents say nothing about the possible content of a European legal framework on public services. The Commission thus seems to want to wind up the debate by hiding behind the new SGI Protocol based on the Lisbon Treaty, without expressing a view on the true potential of the future Article 14 TFEU, a provision which it will, nevertheless, be unable to deprive of its practical effectiveness for long.

Call for Action: a sure legal safeguard for Europe's public services

To safeguard services of general interest and put an end to legal uncertainty, Europe needs — without delay, and in parallel to the implementation by 2010 of the Services Directive — a general EU legal framework for public services, complementary to existing sectoral and national provisions, and introduced on the basis of joint decision-making with the European Parliament.

The new legal framework, in keeping with the interpretative guidelines set out in the new SGI Protocol now provided in the Lisbon Treaty, must:

- clarify the division of responsibilities between the EU and Member States
- introduce criteria for a clear distinction between 'commercial' or 'marketable' services and 'non-commercial' or 'non-marketable' services, to which different legal provisions apply

- enshrine the sovereignty of local authorities in the design and management of the public services for which they are responsible
- guarantee citizens' right to a local input, ensuring that their needs, claims and problems are examined promptly and directly, and protecting consumer and civil rights
- respect the need for specific sectoral legislation for some services, and establish a clear relationship with such legislation, and with the Services Directive, which was adopted in December 2006 and is expected to be transposed in the Member States by the end of 2009
- guarantee respect for the principles of transparency; openness; solidarity; a high quality of service; universality; equality of access; partnership with civil society; workforce participation; and a role for the 'third' sector
- clarify the principles governing the funding of public services, if necessary by specifying and completing the jurisprudence and the "Altmark" package.

The definition, organisation, execution and permanent funding of services of general interest, whether economic or non-economic, must remain a task for Member States and their regional and local authorities. Subject to meeting the key standards and criteria set out above, we envisage the widest variety of solutions for the provision of services at local level, responding to local needs.

Breaking the deadlock — an initial draft SGEI regulation to lead the way to a future "SGEI package"

Despite repeated calls from the European Parliament, and from the Barcelona European Council of 2002, the Commission has failed to produce legislative proposals for services of general interest and general economic interest. They have repeatedly stalled, claiming that the subject is simply too complicated, that a Directive cannot address the many problems while taking account of the hugely differing national traditions in this area. The truth is that the present Commission is in thrall to a narrow, neo-liberal agenda: their difficulty with services of general interest is that they have no interest in legislation which sets limits to the sway of markets. Public services are not their priority.

It is time to call the Commission's bluff. To answer their claim 'it can't be done', the Labour and the PES Group has done it. Last September, we appointed a group of independent legal experts³ to draft a European Framework Directive on public services. The Group also invited a wide range of organisations representing service providers, public authorities and service users to contribute to the group's work⁴. The expert group met three times, together with the participating organisations, and in February 2006 presented an outline framework directive, for debate, to a public seminar.

With the help of external legal expertise, we then finalised a *Draft Framework Directive*, which was made public in November 2006. Taking into account the new political situation and the new legal framework provided by the Lisbon Treaty, the necessary adjustments were made to the text to make it into a *Draft Regulation on SGEI*. This does not mean that all problems will be resolved by a single document. Moreover, the text of the future Article 14 TFEU explicitly concerns 'regulations', and not just one regulation. The various chapters of the our draft regulation represent therefore subject areas which are closely linked in order to create a coherent Community system of services of general economic interest, but which could also pave the way for the adoption of several regulations which would take account of the different subject areas one by one, in the framework of what could be a real "SGEI package"; a regulation on the rights of users, including quality and assessment of SGEIs; a regulation on awarding public service contracts; a regulation on funding of SGEIs; a regulation on relations between SGEI regulatory authorities, etc.

Likewise, we are aware that other regulatory measures might be taken with a view to consolidating the Community SGEI system, since the new legal basis of Article 14 TFEU does not rule out the use of other provisions, but will ensure that those provisions are based on the most democratic procedures, i.e. co-decision between Council and European Parliament and that they are compatible with the provisions of regulations adopted on the basis of Article 14 TFEU. The same would be true for regulations or directives based on the current Article 95 EC (future Article 114 TFEU).

Whatever the case, our draft still aims to take account of the interests of all: of public authorities, public service providers, private business, and citizens. It is neutral as between large or small public sectors; between different sectors; between private or in-house provision of services; and between different national or local choices as to the type and quality of services offered. It provides a set of 'rules of the game' within which national, regional and local authorities can operate without undue interference from the European Commission. At the same time it provides safeguards against misuse of these national and local competences for protectionist purposes.

The objectives we have set out above — legal certainty, local autonomy, enhanced rights for citizens and users of public services — are widely shared, throughout Europe. In our contacts and discussions over the last few months we have been presented time and again with evidence of the urgent need for action to clarify the law. The publication of this new draft regulation is a further major step in continuing a determined campaign for change, uniting users, providers, public authorities and elected representatives at all levels and taking advantage of the opportunities that the Lisbon treaty provide..

Labour Party
23/04/08

APPENDICES

Treaty on the Functioning of the European Union (TFEU) *Articles and Protocol on Public Services*

Article 14

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

PROTOCOL

ON SERVICES OF GENERAL INTEREST

THE HIGH CONTRACTING PARTIES,

WISHING to emphasise the importance of services of general interest,

HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide commission and organise non-economic services of general interest.

European Union Charter of Citizens' Rights

Article 36

Access to Services of General Economic Interest (Public Services)

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

PROPOSAL FOR A EUROPEAN LAW ON PUBLIC SERVICES

The European Parliament and the Council,

Having regard to the Treaty on European Union, and in particular Articles 2, 3, 4, 5 and 6,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 14, 106 and 345,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Article 36,

Having regard to the Protocol on services of general interest, annexed to the Treaties on European Union and on the Functioning of the European Union,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee,

Having regard to the Opinion of the Committee of the Regions,

Acting in accordance with the procedure referred to in Article 294 of the Treaty on the Functioning of the European Union,

Whereas:

- (1)ⁱ In the framework of the Lisbon Strategy designed in particular to consolidate the internal market of services, particular attention must be paid to the specific category of services which are services of general interest (SGI), that is, those which are placed under the control of a competent public authority within the framework of a system of public service or universal service obligations.
- (2) It is necessary to distinguish between services of general interest which are, on the one hand those of a commercial nature and mainly financed by the user, which the EC Treaty qualifies as services of general economic interest (SGEI), and, on the other hand, those which are not of a commercial nature and are financed mainly by public or social funds, which may be regarded as services of non-economic general interest (SNEGI) within the meaning of Article 2 of the aforementioned Protocol on SGI, such as those exercising exclusively social functions or prerogatives of public authorities.
- (3) With regard to non-economic services of general interest, Article 2 of the aforementioned Protocol stipulates that Community law does not affect in any way the competence of Member States to provide, commission and organise such services. Accordingly, this regulation may not apply to services of general interest which are not of an economic nature. This is the case in particular for services through which the Member States carry out their essential duties within the meaning of Article 4 of the Treaty on European Union, in particular those aiming

- to ensure their territorial integrity, maintain public order and safeguard national security.
- (4) With regard to services of general economic interest, Article 14 of the Treaty on the Functioning of the European Union recognises the place occupied by those services in the shared values of the Union as well as their role in promoting the social and territorial cohesion of the Union. These services contribute to the principal objectives of the European Union's task, which are laid down in Article 3 of the Treaty on European Union: a sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy geared to full employment and social progress, a high level of protection and improvement of the quality of the environment, the promotion of scientific and technical progress, the combating of social exclusion and discrimination, the promotion of justice and social protection, gender equality, intergenerational solidarity, economic, social and territorial cohesion and solidarity among Member States.
 - (5) Furthermore, Article 36 of the Charter of Fundamental Rights of the European Union confirms the role of services of general economic interest in promoting economic and social cohesion, by obliging the European Union to recognise and respect access to these services as provided for in national laws and practices, and in accordance with the treaties.
 - (6) Article 14 of the Treaty on the Functioning of the European Union also clearly establishes a shared responsibility of the European Union and the Member States, each within their respective powers, to ensure that services of general economic interest operate on the basis of principles and conditions – in particular economic and financial conditions – that enable them to fulfil their tasks.
 - (7) Declaration No 13 annexed to the Treaty of Amsterdam stipulates that these provisions must be implemented '*with full respect for the jurisprudence of the Court of Justice, inter alia as regards the principles of equality of treatment, quality and continuity of such services*'.
 - (8) The Protocol on SGI lays down interpretative provisions concerning *inter alia* the common values of the EU with regard to services of general economic interest, and in particular: the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users; the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations, and a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

- (9) Therefore, in order to determine and complement the case law of the Court of Justice and thus comply with the requirements of Article 14 of the Treaty on the Functioning of the European Union and implement the interpretative guidelines of the Protocol on SGI, and with a view to providing legal certainty for both the undertakings entrusted with operating services of general economic interest and the citizens who benefit from them, it is necessary to consolidate and clarify in this Regulation the general principles and common conditions for the successful operation of these services.
- (10) This consolidation and clarification is all the more necessary as it helps to reinforce each individual's right to access services of general economic interest, as provided for in Article 36 of the Charter of Fundamental Rights of the European Union, in line, in particular, with the principle of solidarity and, more generally, the constant desire to respect all of the rights and freedoms enshrined in the Charter, the legal value of which is the same as that of the treaties, by virtue of Article 6(1) of the Treaty on European Union..
- (11)ⁱⁱ The proliferation of sector-specific texts on the opening up of the internal market in services of general economic interest reveals some confusion, not to say conceptual contradictions, which are the source of disputes and litigation. This needs to be remedied by introducing a horizontal legal framework to specify and stabilise common concepts and principles, in order to improve the legal environment of sector-specific legislation regarding services of general economic interest and provide greater legal certainty for the benefit of national, regional and local public authorities as well as benefiting citizens and undertakings entrusted with managing or providing them.
- (12) This Regulation seeks to complement the application of the rules of the internal market and the rules on competition to services of general economic interest through common rules that guarantee protection of the general interest and the satisfaction of the users and consumers of these services, the needs and preferences of whom must be taken into consideration as a matter of priority, as stipulated in the Protocol on SGI. This Regulation therefore intends to respect both the spirit and the letter of Article 106(2) of the Treaty on the Functioning of the EU, according to which undertakings entrusted with the operation of services of general economic interest shall be subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules '*does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*'. In this respect, it is important to remember that the objective of this provision, as reiterated by the Court of Justice, is to '*reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compli-*

ance with the rules on competition and the preservation of the unity of the common market, and that its conditions of application seek to allow undertakings entrusted with the operation of services of general economic interest to perform the tasks assigned to them without obstruction, in law or in fact, resulting from the rules of the Treaty and without affecting the development of trade to such an extent as would be contrary to the interests of the Union.

- (13) This Regulation applies to all public authorities or entities delegated by a public authority where the latter seeks to lay down public service obligations for the performance of specific tasks likely to be entrusted to undertakings operating services of general economic interest within the meaning of Articles 14 and 106(2) of the Treaty on the Functioning of the EU,
- (14) This Regulation applies without prejudice both to the sector-specific Community legislation that already sets out the rules applicable to services of general economic interest in order to take account of the specific characteristics of the sectors concerned, and to any other future Community instruments which might be adopted on the basis of Article 14 TFEU or other provisions, seeking to deal with subjects other than those covered by the current Regulation. Nonetheless, this Regulation requires a prior analysis of the impact of its provisions on the operation of services of general economic interest in respect of each of the Commission's proposals to amend one of these sectoral instruments or to establish a new instrument in the area of services of general economic interest.
- (15)ⁱⁱⁱ This Regulation does not in any way prejudice the regulation of services of general economic interest in accordance with the division of competences between the Member States and the European Union and the principles of subsidiarity and proportionality provided for in Article 5 of the Treaty on European Union. In this respect, and as reiterated by the Court of Justice, 'the Member States have broad discretion in defining what they consider to be services of general economic interest'. Their definition may only be called into question by Community law in cases of obvious error. This power of discretion must apply to both the definition of services of general economic interest by the Member States and the method of allocation of these services. To this effect, it is important to recall the Community case-law that stipulates that '*neither the wording of Article 86(2) of the EC Treaty nor European jurisprudence concerning this provision imply that a task of general interest can only be assigned to an operator following a tender procedure*'. The Protocol on SGI confirms this attitude by stipulating that the national, regional and local authorities have broad powers of discretion in providing, commissioning and organising services of general economic interest.
- (16) This Regulation shall be implemented in accordance with Article 345 of the Treaty

on the Functioning of the EU without prejudice to the public or private nature of the operation of services of general economic interest and does not encourage the Member States to liberalise such services. In this respect, this Regulation seeks to encourage diverse forms of management and partnership between public authorities, at both national and local level, service operators, social partners, and users and consumers, in accordance with the Member States' competence for furnishing, and ensuring execution of, these services.

(17) To enable the operators of services of general economic interest to discharge their functions, this Regulation shall establish the minimum, common requirements for financing these services, without prejudice to the competence of the Member States with regard to financing these services, taking into account, in their implementation, the decision of the Commission n°C(2005) 2673 of 28 November 2005 regarding the application of the provisions of article 86, paragraph 2, of the treaty of State aid in the form of compensation for public service, granted to certain undertakings entrusted with managing services of general economic interest.⁵

(18)⁶ This Regulation contributes to the implementation of the priorities for Community action with a view to 'better lawmaking' and seeks to make the economies of the Member States even more competitive. It aims to improve the mechanisms for evaluating and supervising the performance of services of general economic interest, with regard, in particular, to the shared principles and operating conditions set out in this Regulation, always with a view to improving the quality of the service provided to citizens and users as a whole. The evaluation procedure set out for this purpose may be used as a basis for drawing up Community quality standards for services of general economic interest whose activities have an impact on the development of trade between Member States.

(19) In this way, this Regulation also contributes to the Community objective of a high level of consumer protection by ensuring that those benefiting from and using services of general economic interest will see their right to information enhanced, their economic interests properly taken into consideration and their right to make an effective claim recognised should the common principles laid down by this Regulation not be complied with.

NOTE

This proposal takes account of the new provisions provided in the Lisbon Reform Treaty. It does not seek to cover all issues relating to the national systems governing public services. In addition further regulations are possible, with a complementary scope and substance, on the basis of the Lisbon Treaty. Other Treaty articles, in particular the current Article 95 of the EC Treaty and future Article 114 of the Lisbon Treaty could for instance also be used.

REGULATIONS:

CHAPTER I⁷

GENERAL PROVISIONS

Article 1 - Subject

1. This Regulation lays down the general principles and appropriate conditions for the smooth operation of services of general economic interest in the internal market, thus contributing to fair, high-quality access for all service users and greater legal certainty for both national, regional and local public authorities as well as the undertakings entrusted with operating these services.
2. The principles and conditions set out in paragraph 1 of this article cover, in particular, the rules governing the operation, management, supervision, evaluation and financing of services of general economic interest.

Article 2 - Scope

This Regulation shall apply to services of general economic interest whenever a competent authority at national, regional, local or community level imposes public service or universal service obligations on a service provider exercising an economic activity.

Article 3 - Definitions

In the implementation of this Regulation, the following definitions shall apply:

- a) 'Accessibility': the right to benefit from a specified service, whatever its location, in a specified area, in accordance with the conditions specific to the sector in which the service is likely to be offered and supplied; and, where necessary, the right to access an infrastructure or network operated by a single operator and essential for the supply of the specified service.
- b) 'Economic activity': any real and effective activity which consists of supplying, in a specified market, goods or a service in response to a demand.
- c) 'Adaptability': ability of service providers to develop the service in line with the economic and technological developments of the context in which this service is supplied.
- d) 'Competent authority': any community, national, regional or local public authority, or group of public authorities, with the power to specify the public service obligations and impose them on suppliers of a service.

- e) 'Affordability': reasonable, transparent, non-discriminatory, easily and clearly comparable price for the supply of a service.
- f) 'Public service compensation': any benefit, particularly financial, granted directly or indirectly by a competent authority from public funds during the period of implementation of the system of public service obligations, universal service or individual obligations or in connection with that period.
- g) 'Continuity of service': permanent supply of the service to the public under the conditions set out by a competent authority.
- h) 'Public service contract': a legally binding act confirming agreement between a competent authority and an enterprise over which the competent authority does not exercise a control analogous to that which it exercises over its own services, with a view to entrusting the latter with the management and operation of a service of general economic interest; this may include in particular acts of concession, association, public-private partnership or foundation:
 - taking the form of an individual legislative or regulatory act, or
 - containing conditions under which the competent public authority takes on the direct operation of the service.
- i) 'Exclusive or special right': category of rights as laid down by Commission Directive No 80/723/EEC of 25 June 1980, amended, on the transparency of financial relations between Member States and public undertakings.
- j) 'Sustainability': characteristic of a method of management or supply of a service which has regard to respect for the environment through a judicious use of natural resources in order to manage them in the long term.
- k) 'Equality of treatment': right to benefit from a service under conditions which do not discriminate between similar categories of users.
- l) 'Public service compensation fund': body set up by the competent authority with a view to providing the financing for a service of general economic interest, independent of these beneficiaries and funded by contributions from the operators in the market in which the operator and/or supplier of this service participates.
- m) 'Public service obligations': specific requirements a competent authority may impose on the supplier of a service in order to ensure that the general interest objectives which have been clearly set out in advance by the public authorities in an express measure are satisfied.
- n) 'Long-term planning': long-term planning and organisation of production and/or supply and/or transportation capacity of undertakings entrusted with a service of general economic interest, with a view to satisfying the demand of the network on

which supply of this service depends and to ensure that consumers of the service receive their supply.

- o) 'Specified quality': quality as defined in advance by a competent authority in compliance, where appropriate, with standards drawn up by the European Union.
- p) 'System of public service obligations': all the binding rules laid down by a Member State or by the European Union concerning the public service obligations which the operator or supplier of a service of general economic interest must comply with.
- q) 'System of universal service': obligations laid down by the European Union intended to harness the requirement for universality to the specific characteristics of some services of general economic interest.
- r) 'Security' both the security of supply of a service and the technical security which the supply of the service and, if possible, the operation of the network on which this service depends must possess.
- s) 'Security of supply': the ability of the supplier of an energy service to supply this service to users in accordance with the continuity conditions previously laid down by a competent authority.
- t) 'Service of general economic interest': service activity of a commercial nature, mainly financed by the service user and placed under the responsibility of a competent authority in the framework of a system of public service or universal service obligations.
- u) 'Universal service': service which meets the requirement of universality.
- v) 'Universality': right to be a beneficiary of a service of a specified quality and at an affordable price in the whole of a specified geographical area.
- w) 'User': beneficiary or consumer of a service of general interest or a service of general economic interest.

Article 4 - Shared responsibility of Member States and of the European Union

- 1. Taking account of the European Union's respect for the national identities of the Member States, inherent in their fundamental political and constitutional structures, also with regard to local and regional autonomy, the competent authorities of the Member States are free to define what they consider to be services of general economic interest and have broad discretion to decide how to organise, regulate and finance these services, subject to compliance with the definitions and principles set out in this Regulation and to ensuring that the system applicable to these services does not affect exchanges between Member States to a degree contrary to community interest and beyond what is necessary for the good functioning of these services.

- 2. The competence of Member States set out in this article is without prejudice to the power of the European Union to lay down, to the extent necessary, a system of public service and universal service obligations in the interest of the internal market and of consumers and users of a service of general economic interest.

Article 5 - Relationship with other provisions of Community law

- 1. Application of this Regulation shall not prevent the application or the adoption of provisions of sectoral Community instruments concerning services of general economic interest governed by those provisions, or the adoption of other Community instruments with a complementary scope.
- 2. The horizontal nature of the provisions of this Regulation excludes the application of any other Community provisions of a horizontal nature concerning services in the internal market where they are incompatible with these provisions.

CHAPTER II⁸

TRANSFER OF SERVICES OF GENERAL ECONOMIC INTEREST

Article 6 - Free choice of operation method

All competent authorities are free to choose how to manage a service of general economic interest and in particular to associate themselves with other competent authorities and decide whether to take on the direct operation of a service alone or with other competent authorities or to outsource its operation totally or partially.

Article 7 - Direct operation

1. Direct operation of a service of general economic interest involves the operation of the service by the competent authority, or, in the case of a group of competent authorities, by at least one competent authority, using its own means or through a legally distinct entity over which the authority exercises complete control, similar to the control it exercises over its own departments. Control is deemed to be analogous when the entity cannot take any strategic or important decision without or against the opinion of the competent authority.
2. In the event of recourse to the direct operation of a service of general economic interest, the competent authority, or the separate legal entity which it controls and which manages the service on behalf of the competent authority, shall refrain from any involvement in the operation, supply or financing of any similar service of economic interest outside its territorial jurisdiction.

Article 8 - Outsourced operation

1. Outsourced operation of a service of general economic interest is the delegation by the competent authority, or, in the case of a group of competent authorities, by at least one competent authority, on the basis of a public service contract, of the operation of this service to a legally distinct entity over which it does not exercise a similar control to that exercised over its own departments.
2. The public service contract, apart from the exceptions referred to in paragraph 3 of this article, must be established with respect for the principles of non-discrimination, fairness, publicity and transparency and, where applicable, in accordance with the Community provisions governing public procurement procedures.

3. As an exception to the previous paragraph, a competent authority may decide to grant a public service contract without using a tender procedure. The Commission, after following the consultation procedure set out in Art. 22.2 of the present Regulation, shall specify the categories of acceptable reasons, which may relate only to emergencies, situations which have a small impact on exchanges between Member States or situations involving the specific characteristics of some services of general economic interest.
4. The public service contract shall define the following features clearly and precisely:
 - the system of public service obligations, universal services or individual objectives assigned to the beneficiary of the contract.
 - the service's financing method, complying with chapter IV of this Directive;
 - the period of implementation, which must be adequate and appropriate for the completion of the contract and which must not for any reason whatever exceed seven years;
 - the system of penalties in the event of breach of contract.

CHAPTER III⁹

OPERATION OF SERVICES OF GENERAL ECONOMIC INTEREST

Article 9 - Common scope of public service obligation:

Where a competent authority intends to define and regulate the operation of a service of general economic interest, it shall adopt an express measure in which one or more of the following public service obligations to be imposed on the operator of the service shall be listed and specified:

- accessibility;
- adaptability;
- affordability;
- continuity;
- sustainability;
- equality of treatment;
- long-term planning;
- specified quality;
- security;
- universality.

Article 10 - Consideration of individual objectives

1. Apart from the imposition of a system of public service or universal service obligations, the competent authority may decide to make the operator and/or supplier of a service of general economic interest contribute to objectives of Community, national, regional or local interest, which are clearly defined in advance and laid down in a formal measure in accordance with individual methods and constraints which go beyond simple compliance with common law regulations.
2. Among the objectives alluded to in the previous paragraph, only non-economic objectives may be taken into consideration; for example, urban and country planning, economic and social cohesion, media pluralism, protection of the environment, sustainable development or the protection of personal data.

CHAPTER IV¹⁰

FINANCING OF SERVICES OF GENERAL ECONOMIC INTEREST

Article 11 - Power of Member States to provide financing

This Regulation shall not prejudice Member States' power to provide financing for a service of general economic interest insofar as this financing is granted for the purposes of the smooth running of the service in acceptable economic conditions and the implementation of the system of public service and universal service obligations connected thereto.

Article 12 - Financing methods

Where a competent authority intends to provide financing for a service of general economic interest other than by direct financing through its general budget, it shall choose from one of the following methods of financing, in accordance with the rules of the Treaty, especially Article 106(2) of the Treaty on the Functioning of the EU:

- the granting of special or exclusive rights;
- the granting of public service compensation;
- the assistance from a public service fund;
- the establishment of a tariff averaging system.

Article 13 - Granting of special or exclusive rights

Where a competent authority intends to grant an exclusive or special right to provide the financing for a service of general economic interest, it shall ensure that these rights do not encourage their beneficiary to abuse a dominant position pursuant to Article 102 of the Treaty on the Functioning of the EU and that these rights shall not for any reason whatever limit competition in certain markets to a degree which would not be necessary to comply with the system of public service and universal service obligations imposed on the said beneficiary.

Article 14 - Granting of public service compensation

Where a governmental authority provides compensation to an undertaking delivering a service of general economic interest, that compensation shall not constitute state aid under Article 107 of the Treaty on the Functioning of the EU provided that the following two conditions are met:

- a) the basis or formula on which the compensation is calculated has been established in accordance with an objective and transparent procedure;

- b) the compensation does not exceed what is necessary to cover all or part of the costs of implementing the system of public service or universal service obligations for which the compensation is intended to provide the financing, taking into account the relevant revenue, and allowing for a reasonable profit.

Article 15 - Assistance from a public service fund

Where a competent authority intends to establish a public service fund to provide financing for a service of general economic interest, it shall comply with the following principles:

- independence of the fund operator from the operators and suppliers of the service;
- equality of treatment of the contributors to the fund;
- transparency and objectivity in defining and calculating contributions to the fund;
- adequate and commensurate amount of contributions to the fund within the limit
- required by the system in place for public service or universal service obligations.

Article 16 - Establishment of a tariff averaging system

Where a competent authority intends to provide financing for a service of general economic interest through establishing a tariff averaging system, such a system must set out objectively and transparently the average price for the supply of this service, and this price should be applied uniformly throughout the whole territory under the jurisdiction of the said authority and should be affordable, despite the large differences in the cost of supplying this service.

CHAPTER V¹¹ CONTROL AND REGULATION OF SERVICES OF GENERAL ECONOMIC INTEREST

Article 17 - Authority responsible for control

The competent authority is the guarantor of control and compliance with the system of public service or universal service obligations and the individual objectives assigned to the operator and supplier of a service of general economic interest, without prejudice to the powers granted to the independent regulatory authorities.

Article 18 - Forms of regulation

1. In the sectors where it has laid down a system of public service or universal service obligations or individual objectives, the competent authority shall ensure the setting up of the regulatory procedures and instruments appropriate to the sector concerned, based on transparent rules which allow the organisations entrusted with implementing these regulatory procedures to be identified.
2. The instruments of regulation covered in paragraph one of this article should, as a minimum, allow for the adoption of rules in the following sectors:
 - establishing ways of accessing existing networks, where such access is necessary for the supply of the service;
 - establishing prices and/or rates for the supply of the service;
 - amicable settlement of disputes between the supplier of the service and the user, without prejudice to judicial appeal procedures;
 - consultation and, where necessary, referral to the competent competition authorities of any matter likely to reveal a breach of the rules of national competition and of the Treaty.

CHAPTER VI¹²

USERS' RIGHTS, QUALITY AND EVALUATION OF SERVICES OF GENERAL ECONOMIC INTEREST

Article 19 - Users' rights

1. The competent authority shall ensure that the supply and operation of the services of general economic interest have a high level of user protection and pay particular attention to the categories of users who are most disadvantaged, most isolated, or most economically or socially vulnerable.
2. To this end, every user or beneficiary of a service of general economic interest must have the following rights recognised by the competent authority:
 - the right to an optimum level of health protection, physical safety and technical reliability of the service;
 - the right to clear, useful and easily accessible information on the essential conditions of supply, operation, financing and invoicing or pricing of the service;
 - the right to access information concerning the user which is kept or collected by the operator and/or supplier of the service and by the competent authority;
 - the right to claim compensation from the operator and/or supplier of the service in the event of a failure to comply with a public service obligation or an individual objective under this Directive which has been assigned to the latter, and the right to diligent and prompt treatment of this claim;
 - the right to have recourse, effectively and distinctly, to amicable and judicial procedures to settle disputes between the user and the operator and/or supplier of the service or in the event of the rejection of a claim under this Article or the failure to reply to it, provided the procedure is, whatever its cause, reasonably efficient, speedy and inexpensive;
 - the right to adequate and commensurate compensation in the event that a claim or procedure under this Article is adjudged valid.

Article 20 - Policy on quality

1. The competent authority shall establish objective and transparent quality standards in order to guarantee the performance of the public service or universal service obligations or individual objectives assigned to the operator and/or supplier of a service of general economic interest.

2. In establishing the quality standards referred to in the first paragraph of this Article, the competent authority shall ensure that the following aspects shall be taken into consideration:
 - protection and safety of beneficiaries of the service;
 - adequate and commensurate standard with regard to the objectives implemented and the cost of the service;
 - widest possible broadcast and publication of the standard;
 - easy and effective checking of compliance with the standard.
3. As far as possible, and especially if the evaluation procedure referred to in Article 21 of this Regulation shows this to be useful, the competent authority may demand that the operator and/or supplier of a service of general economic interest make(s) precise commitments in terms of improving the quality of the service, based on a charter or code of proper conduct.
4. The competent national, regional and local authorities shall make the charters or codes of proper conduct referred to in this Article publicly available and easy to consult.

Article 21 - Evaluation

1. In order to verify that the system of public service or universal service obligations and, where necessary, individual obligations are correctly and effectively carried out by the operator and/or supplier of a service of general economic interest, and in order to meet the requirement for the service to be adapted to regulatory and technological developments, the competent authority shall set up an evaluation system for the performance and quality of such services.
2. The evaluation system set up by the competent authority at national or local level, in accordance with this Article, shall meet the following requirements: the evaluation process to take place annually, unless there should be an exception;
 - transparency of evaluation criteria;
 - compulsory communication, by the operator and/or supplier of the service, of the data required for the evaluation;
 - consultation of regulatory authorities in the sector being evaluated;
 - involvement of citizens' associations, consumers and users groups and social partners in the evaluation process;
 - publication of a report setting out the results of the evaluation.

3. The competent authorities shall, upon its publication, send to the Commission a copy of each evaluation report adopted by virtue of this Article. The Commission shall make public each year a summary comparative report of the national evaluations per sector, emphasising in particular the good practice which it will take into the greatest consideration each time it intends to adopt an initiative or a proposal likely to have an impact on the operation, supply or financing of a service of general economic interest.

Article 22 - Public consultation and participation methods

1. The Member States and the European Union shall ensure, each in their respective field of competence, that the largest number of economic, institutional and social partners concerned shall be involved in the adoption of measures regarding the implementation of this chapter.
2. Where the Commission intends to adopt an initiative or a proposal as part of the implementation of this chapter, it shall, in collaboration with the European Parliament and the Council, and in accordance with the most appropriate methods, especially those inspired by the Open Method of Coordination, encourage and organise debate between the various existing forums (Economic and Social Committee, Committee of the Regions, consultative bodies, consumer associations and associations of locally elected representatives, consultative bodies of regulatory authorities in the sectors involved, and in general any organised consultative body which promotes or considers services of general interest), and shall involve representatives of the economic sectors concerned in this debate. Following the debate, a summary report, an impact analysis of the proposal regarding the application of the present directive and a list of recommendations shall be drawn up and made public. The Commission will make every effort to take these into account in drawing up its initiative or proposal.

CHAPTER VII

FINAL PROVISIONS

Article 23 - Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Notes

- ¹ Broadly, that the EU and Member States must ensure the conditions in which operators of so-called 'services of general economic interest' (see next section) can fulfil the public service objectives assigned to them.
- ² COM (2003) 270, COM (2004) 374, COM (2006) 177 and COM (2007) 725
- ³ The group included Professor Stéphane Rodrigues - Professor of University Paris I and lawyer at Lallemand&Legros, Jean-François Auby - legal adviser for local public services (France), Jens Lattmann - legal adviser for German Local Government Organisation (Germany), Per Klok - senior international adviser for Danish Confederation of Trade Unions (Denmark), Professor Giuseppe Pericu, jurist, Mayor of Genoa (Italy).
- ⁴ European Commission, European Economic and Social Committee, Committee of the Regions, European Federation of Public Service Unions (EPSU), European Liaison Committee on Services of General Interest (CELSIG), Council of European Municipalities and Regions (CEMR), International Centre of Research and Information on the Public, Social and Cooperative Economy (CIRIEC), European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP).
- ⁵ OJEU L 312, 29 November 2005
- ⁶ Recitals (17) and (18) state and justify the provisions of the Regulation concerning the evaluation of services of general economic interest and the protection of consumers of these services.
- ⁷ The content of this chapter focuses on the type of services to be governed by the Directive, namely services of general economic interest. It defines the subject of this Regulation by laying down the general principles and appropriate conditions for a smooth operation of these services in the internal market. Furthermore, all the definitions used in the application and interpretation of the Regulation are given in this chapter, under Article 3, including what have been presented until now as the common principles of operation and to which we will refer in a specific chapter. The definitions proposed are taken mainly from Community case law (notably the *Corbeau*, *Commune d'Almelo* and *EDF/GDF* judgments) and from secondary Community legislation either currently in force (especially the *Electricity*, *Gas* and *Postal Directives*) or to be implemented (Proposal for a Regulation on public transport services). Moreover, under Article 4 it is made clear that the principle of subsidiarity is not called into question and that it is up to the Member States to define these services and to decide how to organise, regulate and finance them. However, Article 4 underlines the power of the European level to lay down a system of public services and universal service obligations in the interest of the internal market and consumers and to ensure the proper functioning of cross-border services in this respect. Finally,

Article 5 makes clear that this horizontal regulation will not replace any sectoral community instrument in this context, but that any provisions of the Service Directive, which are incompatible with the present proposal, would not apply to services of general economic interest.

- ⁸ Rather than setting out individual provisions on SGEIs' methods of operation or devolution and thus risking an incursion into contract law and public contract law, this chapter starts from the presumption that the services will be freely administered by the public authorities, which means a choice between two categories of operation method: direct operation (Article 7) and outsourced operations (Article 8). The only constraint is therefore the use of a contractual instrument to define the scope and effect of the public service obligations. In particular, under Article 8, the regulation clarifies the situation for SGEI in relation to public procurement provisions and supports new ways of management of SGEI, linked to article 3(h).
- ⁹ The main idea of this chapter is to give a mandatory common list of public service obligations from which the Member States must draw when they intend to define a SGEI, with greater discretion for Member States to impose other constraints, on condition they do so with a certain minimum level of transparency and justification. The reference to 'individual objectives' is directly drawn from Court of Justice case law (especially the *Commune d'Almelo* and *EDF-GDF* judgments quoted above).
- ¹⁰ This chapter gives general principles and appropriate conditions regarding financing of SGEI, and in particular lays down some financing methods and clarifies the conditions of their compatibility with Community law following the CJEC judgment in the '*Altmark*' case (2003) and its implementation by the European Commission. Moreover, these provisions provide for additional transparency and objectivity in the context of financing SGEI without fixing specific thresholds.
- ¹¹ In the interests of greater clarity and transparency, this chapter lays down principles for control and regulation, but without any obligation to develop new regulatory bodies at the different policy levels concerned.
- ¹² As already underlined in recitals (17) and (18), among the objectives of this Regulation is to contribute to a high level of user and consumer protection by ensuring the rights to information and to redress. Moreover, without creating an obligation to develop European quality standards, the Regulation establishes procedures for transparent quality standards and their evaluation, provided by the competent national, regional or local authority which could be based - on a voluntary basis - on a charter or code of good conduct. At European level, the European Commission will publish each year a summary comparative report of national evaluations per sector. Finally, inspired by the Open Method of Coordination, consultation, involving all key

EU institutions, social partners and representatives of regional, economic and consumer protection bodies, should be used when implementing this chapter and when drawing up any initiatives or impact assessments on the application of this regulation.

The principal objective of recitals (1) to (11) is to set out the content of the Proposal for a Regulation through justifying its implementation by reference to the 'political mandate' referred to in Article 14 TFEU, which is addressed both to the Member States and to the Community institutions in order to ensure the effective operation of services of general economic interest in the internal market. Moreover, recitals (1) to (3) address the issue of the delimitation of the concepts of SGEI and SNEGI in relation to the scope of the Regulation.

- ii Recital (12) relates to the links between this Regulation and other existing provisions in secondary Community law, as explained in Article 3 of the text.
- iii Recitals (14) to (16) deal respectively with Member States' and the European Community's spheres of action with regard to the definition, transfer, operation and financing of services of general economic interest, as explained in Article 4 of the text.

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European Economic and Social Committee
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European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP)
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